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Blue Valley Plantation Bhd v Periasamy a/l Kuppannan & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02 () – 1 OF 2010(A)
ZAKI AZMI CHIEF JUSTICE, ZULKEFLI AND MOHD GHAZALI FCJJ
15 APRIL 2011

Civil Procedure — Striking out — Winding up petition — Petition filed for failure to pay amount due to respondents under consent order — Appellants later paid into court full payment due under consent order on condition winding up terminated — Whether respondents' refusal to accept payment and discontinue winding-up vexatious conduct and abuse of process of court — Whether good ground to apply to strike out petition — Whether striking out application inordinately delayed

The respondents were 22 petitioners who had, under one petition, filed for the winding up of the appellant, a public company, for failing to pay RM5,453,924.75 due in unequal proportions to the respondents under a consent order dated 18 October 1996. Under the order, the respondents were also to receive land of varying sizes totalling 65 acres. The respondents' winding up petition was filed in November 2000. Eight years later, in November 2008, the appellant filed an application under O 18 r 19 of the Rules of the High Court 1980 to strike out the petition on the ground it was frivolous, vexatious or an abuse of process of court. In April 2009, the appellants paid RM7,685,062.38 into court, being the full amount due to the respondents under the consent order with interest. The payment was conditional upon the respondents terminating the winding-up petition as well as the appointment of provisional liquidators. The respondents refused to accept the payment and wanted to proceed with the winding up petition. The appeal to the Federal Court was against the Court of Appeal's decision to dismiss the appellant's striking out application for inordinate delay.

Held, allowing the appeal with costs in the Federal Court and the courts below:

(1) (per **Zaki Azmi Chief Justice** and **Mohd Ghazali FCJ**) The respondents had acted in a vexatious manner and abused the process of the court by continuing to seek the winding-up of the appellant even after the appellant had in good faith paid the money into court. This provided the grounds for the appellant to apply to strike out the petition (see para 22).

(2) (per **Zaki Azmi Chief Justice** and **Mohd Ghazali FCJ**) There was no unreasonable or inordinate delay by the appellants in making the striking-out application. In considering whether a party had delayed

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taking steps to file his application, time must be calculated from the date the grounds supporting his application arose (see para 21).

(3) (per **Zaki Azmi Chief Justice** and **Mohd Ghazali FCJ**) Although leave to appeal to the Federal Court was granted in respect of three questions of law, the court was not bound to answer those questions if it served no purpose to do so in deciding the appeal. In this case, the question was essentially on the exercise of discretion to strike out the petition (see para 24).

(4) (per **Zulkefli FCJ**) The ground of inordinate delay could not be attributed to the appellant to dismiss its application to strike out the petition as, from the beginning, when the consent order was recorded, the parties knew that the settlement process would take time (see paras 6 and 2).

(5) (per **Zulkefli FCJ**) The respondents were well aware of the delay caused by the subdivision of the land for them to receive their portions of land under the consent order (see para 2).

(6) (per **Zulkefli FCJ**) There was nothing objectionable about the appellant applying to strike out the petition in November 2008 as the respondents, being the petitioners themselves, had not proceeded forthwith to deal with the petition filed in the year 2000 (see para 5).

(7) (per **Zulkefli FCJ**) The appellant had justifiable grounds to apply to strike out the petition when in good faith it had paid into court the agreed sum under the consent order but which was refused by the respondents who insisted on continuing with the petition (see para 5).

[Bahasa Malaysia summary

Responden-responden merupakan 22 pempetisyen yang telah, di bawah satu petisyen, memfailkan untuk menggulungkan perayu, sebuah syarikat awam, kerana gagal membayar RM5,453,924.75 yang kena dibayar dalam bahagian tidak sama rata kepada responden-responden di bawah perintah persetujuan bertarikh 18 Oktober 1996. Di bawah perintah itu, responden-responden juga menerima tanah pelbagai saiz berjumlah 65 ekar. Petisyen penggulungan responden-responden telah difailkan dalam bulan November 2000. Lapan tahun kemudian, dalam bulan November 2008, perayu telah memfailkan satu permohonan di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk membatalkan petisyen itu atas alasan ia remeh, menyusahkan atau satu penyalahgunaan proses mahkamah. Pada bulan April 2009, perayu-perayu telah membayar RM7,685,062.38 ke mahkamah, iaitu jumlah keseluruhan yang kena dibayar kepada responden-responden di bawah perintah persetujuan dengan faedah. Pembayaran itu bersyarat tertakluk kepada responden-responden menamatkan petisyen penggulungan itu dan juga pelantikan penyelesai sementara. Responden-responden enggan menerima

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bayaran itu dan ingin meneruskan petisyen penggulungan tersebut. Rayuan ke Mahkamah Persekutuan adalah terhadap keputusan Mahkamah Rayuan yang menolak permohonan pembatalan perayu kerana kelewatan melampau.

Diputuskan, membenarkan rayuan dengan kos di Mahkamah Persekutuan dan mahkamah bawahan:

(1) (oleh **Zaki Azmi Ketua Hakim Negara** dan **Mohd Ghazali HMP**) Responden-responden telah bertindak dalam cara yang menyusahkan dan telah menyalahgunakan proses mahkamah dengan terus memohon penggulungan perayu meskipun setelah perayu dengan niat baik membayar wang ke mahkamah. Ini memberikan alasan-alasan kepada perayu untuk memohon pembatalan petisyen itu (lihat perenggan 22).

(2) (oleh **Zaki Azmi Ketua Hakim Negara** dan **Mohd Ghazali HMP**) Tiada kelewatan yang munasabah atau melampau oleh perayu-perayu dalam membuat permohonan pembatalan. Dalam mempertimbangkan sama ada pihak lewat mengambil langkah untuk memfailkan permohonannya, masa patut dikira daripada tarikh alasan menyokong permohonannya berbangkit (lihat perenggan 21).

(3) (oleh **Zaki Azmi Ketua Hakim Negara** dan **Mohd Ghazali HMP**) Walaupun kebenaran untuk merayu ke Mahkamah Persekutuan diberikan berkaitan tiga persoalan undang-undang, mahkamah tidak terikat untuk menjawab persoalan tersebut jika tidak ada tujuan untuk berbuat demikian dalam memutuskan rayuan tersebut. Dalam kes ini, persoalan khususnya tentang amalan pelaksanaan budi bicara untuk membatalkan petisyen itu (lihat perenggan 24).

(4) (oleh **Zulkefli HMP**) Alasan kelewatan melampau tidak boleh berpunca daripada perayu untuk menolak permohonannya untuk membatalkan petisyen tersebut kerana, dari mula lagi, apabila perintah persetujuan direkodkan, pihak-pihak mengetahui bahawa proses penyelesaian akan mengambil masa (lihat perenggan 6 dan 2).

(5) (oleh **Zulkefli HMP**) Responden-responden amat sedar tentang kelewatan yang disebabkan oleh pembahagian tanah untuk mereka menerima bahagian tanah mereka di bawah perintah persetujuan itu (lihat perenggan 2).

(6) (oleh **Zulkefli HMP**) Tiada apa yang boleh dibantah tentang perayu memohon untuk membatalkan petisyen dalam bulan November 2008 kerana responden-responden, yang merupakan pempetisyen sendiri, tidak meneruskan urusan mengendalikan petisyen itu dalam tahun 2000 (lihat perenggan 5).

(7) (oleh **Zulkefli HMP**) Perayu mempunyai alasan yang boleh menjustifikasikan permohonan untuk membatalkan petisyen itu kerana

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telah dengan niat baik membayar ke mahkamah jumlah yang dipersetujui di bawah perintah persetujuan tetapi yang telah ditolak oleh responden-responden yang berkeras ingin meneruskan dengan petisyen tersebut (lihat perenggan 5).]

Notes:

For cases on winding up petition, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7621–7631.

Cases referred to

Ansa Teknik (M) Sdn Bhd v Cygal Sdn Bhd [1989] 2 MLJ 423 (refd)
Apirami Sdn Bhd v Tamil Nesan (M) Sdn Bhd [1986] 1 CLJ 493, HC (refd)
Bellador Silk Ltd, Re [1965] 1 All ER 667, Ch D (refd)
De Montfort and Ors v Southern Cross Exploration NL (1987) 17 NSWLR 468 (folld)
Filotek Trading Sdn Bhd v Buildcon-Cinaco Concrete Sdn Bhd [1999] 4 MLJ 268, HC (refd)
NKM Development Sdn Bhd v Irex Sdn bhd [1988] 1 CLJ 65 (refd)
Nationwide v Franklins (2002) 20 ACLC 308, SC (folld)
Si & Si Sdn Bhd v Hazrabina Sdn Bhd [1996] 2 MLJ 509 (refd)
Tan Kim Hor & Ors v Tan Heng Chew & Ors [2003] 1 MLJ 492, CA (refd)
Terengganu Forest Products & Anor v Cosco Container Lines Co Ltd & Anor and other applications [2011] 1 MLJ 25; [2011] 1 CLJ 51, FC (refd)

Legislation referred to

Companies Act 1965 ss 218 2(a), 264
Companies (New South Wales) Code 1982 [AU] s 364
Companies (Winding-Up) Rules 1972 r 32
Courts of Judicature Act 1964 s 96
Rules of the High Court 1980 O 18 r 19

Cyrus Das (L A Gomes, A Silvanathan and V Manoharan with him) (L A Gomes, Meor Shaazizi & Associates) for the appellant.
V S Viswanathan (A Mariadass with him) (Mariadass Lock & Ainuddin) for the respondents.

Zaki Azmi Chief Justice:

[1] This appeal basically deals with the issue of whether the petition to wind up the appellant should be struck out under O 18 r 19 of the Rules of the High Court 1980. That rule provides for striking off on any pleading on grounds that it is frivolous, vexatious or an abuse of the process of the court.

(19) The Court may at any stage of the proceedings order to be struck out or

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A amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:-

(a) it discloses no reasonable causes of action or defence, as the case may be; or

B (b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court;

C and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

That O 18 r 19 applies to striking out a petition to wind up a company is well established (*NKM Development Sdn Bhd v Irex Sdn bhd* [1988] 1 CLJ 65; *Ansa Teknik (M) Sdn Bhd v Cygal Sdn Bhd* [1989] 2 MLJ 423; *Si & Si Sdn Bhd v* D *Hazrabina Sdn Bhd* [1996] 2 MLJ 509, *Filotek Trading Sdn Bhd v Builcon -Cimaco Concrete Sdn Bhd* [1999] 4 MLJ 268; *Tan Kim Hor & Ors v Tan Heng Chew & Ors* [2003] 1 MLJ 492).

In answering whether this petition to wind up the appellant has been filed on E the grounds which are frivolous, vexatious or an abuse of the process of the court, we will also have to consider the following questions. They are:

(a) Whether there was an inordinate delay in filing the application to strike out.

F (b) Refusal by the respondents to accept payments made into court by the appellant.

[2] Leave was granted on three questions which will be quoted in the appropriate part of this judgment.

G

FACTS OF THE CASE

[3] The respondents are 22 petitioners who had under one petition filed for the winding up of the appellant, a company registered as a public company on H the ground that the appellant has failed and neglected to pay a sum of RM5,453,924.75 which the appellant had by a consent order agreed to pay the respondents. According to that consent order, appellant was to pay the individual respondents out of the aggregate sum different amounts out of that total amount mentioned earlier within twelve months of the service of the I consent order, which period may be extended subject to payment of interest. The consent order dated 18 October 1996, was served on the respondents on 14 March 1997. In addition to payment of these monies to the respondents, each respondent was also to be given pieces of land of varying sizes totalling 65 acres. The respondents have been given vacant possession to those lands and in

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fact occupied and carried on activities on their respective pieces of lands and deriving income from these activities. For the purpose of this ground of judgment, the facts leading to the consent order need not be cited as they are not relevant to the issues and are not disputed.

[4] As a result of the failure on the part of the applicant to pay the amount due which is paramount to the consent order, in November 2000 the respondents filed a petition to wind up the appellant. Seven years later, an ex parte application for an appointment of provisional liquidator was made. Almost eight months after that, a provisional liquidator was appointed. On 7 November 2008, ie eight years after petition to wind up was filed, an application was filed under O 18 r 19 to strike out the petition. The Court of Appeal held that there was inordinate delay in filing the application under O 18 r 19 and dismissed the application to strike out.

[5] The appellant justified their actions by arguing that they had paid into court the amount due under the consent order together with interest towards settlement of the amount due to the respondents. This payment into court was made in April 2009, more than 12 years after consent judgment was made. That payment was however subject to the conditions that the respondents terminate the petition to wind up the appellant as well as the appointment of the provisional liquidators. According to the appellant, the respondents refused this and continued to stand firm on proceeding with their petition to wind up the appellant.

[6] The respondents' reason for refusing to accept the amount was, according to them, they feared that even if they accepted the amounts, these amounts were liable to be ordered to be paid back to the provisional liquidators as they may be construed as preferential payments under s 264 of the Companies Act.

> Companies Act 1965, s 264 Distribution of property of company
>
> Subject to the provisions of this Act as to preferential payments the property of a company shall, on its winding up, be applied pari passu in satisfaction of its liabilities, and subject to that application shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company

The appellant replied that the real reason for them insisting that the appellant to be wound up was that they wanted the 65 acres of land rather than the monies. As a result of the delay in appellant settling the amounts due with the respondents, respondents had wanted an additional 65 acres of land to be distributed amongst them in lieu of the cash payments. It was further claimed that the value of the 65 acres of land would be worth more than the amounts that were to be paid to the respondents. In short, the respondents were holding

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the appellant to 'blackmail'.

'TENDER OF PAYMENT'

[7] Counsel for the appellant, contended that since the appellant have paid RM7,685,062.38 into court in April 2009 and there was continued readiness to pay that was a sufficient answer to the claim for the debt. Both these arguments, are supported and answered in *Nationwide v Franklins* (2002) 20 ACLC 308 at p 310 Barret J, in the Supreme Court of New South Wales said

> Principles concerning tender and payment are discussed there (*Australian Mid-Eastern Club Ltd vs Yassim*) and I regard the matter as relatively clear. The defendant tendered the sum of $14,190 to the plaintiff but the plaintiff refused the tender. That refusal, Meagher JA tells us in the *Australian Mid-Eastern Club* case, means that the debt was not eliminated, a conclusion which is not surprising. *But as Meagher JA later observed, tender is an answer to a debt claimed if there is a continued readiness to oav. coupled with an actual payment into court*. As I read what his Honour said, the actions the defendant took and the other events which happened yesterday afternoon amount to what his Honour called an answer to a claim for the debt. On that basis the plaintiff's creditor status should probably be regarded as gone. (Emphasis added.)

[8] In an earlier Supreme Court of New South Wales referred to in the judgment, the decision of *Australian Mid-Eastern Club Ltd v Yassim* 1 ACSR 399, the court agreed with the creditor that since the company was likely to be wound up and there were other creditors, the company would probably have to return payment in the event of a winding up order being made against the company. In Yassim's case however, payment was tendered by cheque and not deposited in court as in the Nationwide case. In *Yassim*'s case, Meagher JA said;

> The tender is no answer to a claim for the debt unless (as did not happen here) there is continued readiness to pay coupled with an actual payment into court: see *Halsbury's Laws of England*, Vol 9, (3rd Ed), Butterworths, para 289, at p 169.

I agree with the reasoning of the learned judges in both cases.

[9] I am further supported by the views of Needham J in *De Montfort and Ors v Southern Cross Exploration NL* (1987) 17 NSWLR 468 at p 471, where he said:

> It would, I think, be quite unacceptable for a creditor to serve a notice upon a debtor specifying a sum in that notice, then, when the debtor failed to comply with that notice, take proceedings, be paid the full amount claimed, and then seek to wind the defendant up nonetheless

[10] In *De Montfort* case, the creditor/plaintiff sought to wind up the

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debtor/defendant company notwithstanding that the creditor/plaintiff had paid the amount specified in the notice served on the debtors/ defendant pursuant to s 364 of Companies (New South Wales) Code 1982.

[11] As earlier mentioned, the payment into court was conditional. To me these conditions are fair. Why would a debtor want to make payment towards settlement of his debt if he continues to have the dagger hanging over his head? He would expect the creditor to withdraw the petition pending against him. It would make no difference if the respondents were to accept the money deposited into court and having to repay it later (because he is considered as preference creditor) or waiting for the appellant to be wound up and collecting his share of the dividends from the appellant. The net amount the respondents will finally get would be the same. If they were to take the money deposited into court, there is still a strong possibility that the company may not be wound up. I agree with the views of Barret J in *Nationwide* who said:

> It would be in no worse position if it accepted and was later forced to disgorge. There is nothing compelling a creditor somehow to remain pure by shunning a payment in respect of which there exists some theoretical future possibility of its proving to be preferential. A normally motivated creditor would be inclined to accept such a payment conscious of any risk of disgorgement, and with fingers crossed to the extent indicated by the circumstances

[12] In this appeal before us, the respondents in my view had acted unreasonably by refusing to accept the tender of payment and the appellant's continued readiness to pay. This was shown by the appellant depositing the amount RM7,685,062.38 into court.

[13] As mentioned earlier, the appellant urged us to infer that the true reason for the respondents pushing for the winding up order was to force the appellant to transfer to them the 65 acres of land in place of the money compensation. In short, the petition was filed for a collateral purpose. In *Apirami Sdn Bhd v Tamil Nesan (M) Sdn Bhd* [1986] 1 CLJ 493, VC George J following *Re Bellador Silk Ltd* [1965] 1 All ER 667 at p 672 A–B, stated that the court will dismiss a petition to wind up a company if it is satisfied that the petition was filed for a collateral purpose. Plowman J held that:

> ... A petition which is iaunched not with the genuine object of obtaining the relief claimed, but with the object of exerting pressure in order to achieve a collateral purpose is, in my judgment, an abuse of the process of the court, and it is primarily on that ground that i wouid dismiss this petition.

INORDINATE DELAY

[14] The Court of Appeal dismissed the appeal on the grounds that there has

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A been an inordinate delay on the part of the appellant in applying to strike out the petition. As mentioned above, the application under O 18 r 19 was made eight years after the petition was filed.

B **[15]** The courts do not encourage parties to delay making any interlocutory application because by delaying such applications the final decision of the court will also be delayed. It had been the practice of some plaintiffs or defendants to wait until the last minute to file all sorts of interlocutory applications. Today the Malaysian courts are discouraging these practices. Parties, particularly now, should not delay proceedings by filing interlocutory applications when the substantive hearing can be fixed by the trial courts early. There is therefore no need to apply for striking off petitions to wind up a company (or for that matter, any pleadings) when the same issues could be raised in the hearing of the petition (or the action) and the matter to be finally determined. These expedition disposals have been proven by the practice of our New Commercial Courts and the New Civil Courts, where there are close monitoring of actions filed in that court and cases targeted to be completed within a year from filing.

E **[16]** The Court of Appeal and this court (including any appellate court) abhor appeals in respect of interlocutory applications when issues raised in such application could be finally heard and disposed in the main suit. To me, seeking for certain interlocutory orders are sometimes merely delaying tactics taken up by a party who do not have a strong case. In some cases, delaying tactics can be taken up by a party to tire out his opponent with a view to forcing that opponent to an unfair settlement, belay can cause injustice to a party particularly when he has a strong case. A company which is made a subject of winding up petition can suffer huge losses pending hearing of the petition, more so when a provisional liquidator has been appointed. As we know the service charges of a provisional liquidator can be very high. They will eat into assets of the company to the detriment of the bona fide creditors or the shareholders of the company.

H **[17]** Since delay in determining any application to strike out is detrimental to the parties, such application should be heard and decided upon early. Such application should not be considered except in obviously unsustainable proceedings. Where there is any doubt that discretion to strike out should be exercised, such application should be dismissed. Once dismissed, the subject matter of the action should proceed to hearing as soon as possible. The appellate court should be discouraged from spending too much time on an appeal against an order of refusal to strike out since, as I had said, the trial court will be deciding on issues raised by the applicant anyway. If the appellate court is of the opinion that such appeal is obviously to delay the hearing of the action at the trial court, it must be ready to discourage such action by imposing deterrent costs because it is an injustice to the innocent party. However, where

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it is an appeal against an order striking out any proceedings, the appellate court must be more considerate, since such an order is final. This argument equally applies in cases of applications for summary judgments. If such application for a summary judgement is refused, the appellate court should not waste too much time but to send the case for early disposal.

[18] As regards applying to strike out a petition to wind up a company, I would like to reaffirm the sentiments expressed by Abdul Hamid Mohamed J (as he then was) regarding invoking O 18 r 19 to strike out a petition to wind up a company. In *Filotek Trading Sdn Bhd v Buildcon-Cinaco Concrete Sdn Bhd* [1999] 4 MLJ 268, when discussing the subject said:

> The scheme under the Companies (Winding up) Rules 1972 is different When the petition is issued out of court, a hearing date is given straight away. Whatever has to be done, eg service, advertisement, compliance with r 32, wiii have to be done before the hearing date. The court is supposed to hear the petition straight away on the date fixed for hearing, the very first time it comes up before it. if everything is done as scheduled, the petition is heard on the date first fixed for hearing. That is what the ruies envisage, in the circumstances, there is no necessity for provision for judgement in default, summary judgment or striking out the pieading or trial on issues. I am of the view that that is the reason why the Company (Winding up) Rules 1972 do not provide for such procedures. They are not necessary.
>
> Furthermore, more often than not, resort to O 18 r 19 of the RHC 1980 in a winding-up proceedings results in the delay in the hearing of the petition. The application is usually filed one or two weeks before the date fixed for the hearing of the petition. Application is made for it to be heard first, supposedly, to save the court's time. In reality, it delays the hearing of the petition. Whenever there is such ah application, inevitably, the hearing of the petition is delayed. Not only will the petition be adjourned for the application to be heard first, but if dismissed, there will be an appeal to the higher court(s).

[19] These views were further reiterated by Richard Malanjum JCA (as he then was) in *Tan Kim Hor & Ors v Tan Heng Chew & Ors* [2003] 1 MLJ 492 but he also considered that in appropriate cases that procedure may be applicable:

> We find the philosophy implicit in the above statements convincing and adopt it in affirming the view that an application made pursuant to O 18 r 19 of the RHC to strike out a petition presented under s 218 of the Act is undesirable and should be discouraged. In our view, the use of that procedure in such winding up proceeding produces only delay in the adjudication of the matter. Of course, we are not saying that it is totally inapplicable. There may be an instance where such a petition is obviously unsustainable for want of cause of action or that it is plainly vexatious or frivolous or even an abuse of process. In such a case, O 18 r 19 could be resorted to. Accordingly, we cannot therefore fully accede to the request of learned counsel for the petitioners. In our view, the background facts of each case are relevant to determine whether a striking out application is appropriate. For instance in the

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present case, we find that there are matters that cannot be disposed of summarily yet the learned judge in the court below found them as facts.

[20] Even in this case before us, the petition could have just been remitted to the High Court since the grounds sought to strike out the petition could be raised at the hearing of the petition itself. However, if on the other hand, the grounds supporting the striking out the petition are truly plain and obvious, it would also be merely extending the delay as well as incurring more expense and cost for the case to be remitted to the High Court for the hearing of the petition.

[21] If by the act of one party, the other party can show satisfactorily to the court that, as in this case, an order for striking out the petition to wind up the appellant is plainly and obviously vexatious and abuse of the process of the court and this action to strike out is taken within a reasonable period of the act of the other party, there cannot be said to have been any unreasonable or inordinate delay by the party making the application. In considering whether a party has delayed taking steps to file his application, time must be calculated from the date the grounds supporting his application arose. This however does not mean that a party should be allowed to create a situation to enable him to justify the application before him.

[22] In my opinion the respondents before us had acted in a vexatious manner and abused the process of the court by continuing to seek for the appellant to be wound up even after the appellant had in good faith paid the money into court. Although there may not have been such reason when originally filing the petition to wind up the appellant, once the respondents insisted on persisting with the petition, they can be deemed to have acted in a vexatious manner. This is a ground for striking out the petition to wind up the appellant. In other words, although at the filing of any action, the petitioner may have acted in good faith, subsequent conduct or action by him may provide grounds for the other party to seek to strike out the action. The application to strike out the petition was filed soon after the tender for payment of respondents' claim was deposited in court. Therefore, there was no undue delay on the part of the appellant.

QUESTIONS

[23] Leave to appeal was granted in respect of the following three questions:

(a) Whether the Companies Act 1965 and the Winding-Up Rules 1972 permit a joint petition on a several judgment;

(b) Whether s 218(2)(a) permits a multi-creditor petition by allowing the

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aggregation of sums due to several individual creditors for purposes of presentation of winding up petition;

(c) Whether a company may be deemed insolvent when it has paid its debt due in full into court.

[24] As I had stated at the beginning of this judgment, the question is essentially on the exercise of the discretion to strike out the petition. All the questions in the manner drafted need not be answered. An appeal, even at the Federal Court, is to correct an error committed by the lower court, if any. At the Federal Court, however, s 96 of the Courts of Judicature Act 1964 requires leave before a civil appeal is heard and that leave be given only if the preconditions set out in that section are satisfied. Once leave is given, this court should not be bound by those questions allowed if it serves no purpose to answer. If the questions allowed need not be answered to decide the appeal justly, in my opinion it may hear the appeal and decide without answering the question. As I had said in *Terengganu Forest Products & Anor v Cosco Container Lines Co Ltd & Anor and other applications* [2011] 1 MLJ 25; [2011] 1 CLJ 51:

> But in my opinion the appellate panel is not prevented from granting leave to amend the question allowed by the leave panel or even to add in new question in order to achieve the ends of justice. The requirement of the applicant to draft a question is merely to assist the court in complying with r 108(1)(c) of the Rules of the Federal Court as well as to enable the leave panel to identify the question intended by s 96(a).

[25] The panel hearing the appeal proper may also amend or re-word the question to achieve the same objective. To answer a legal question not related to the facts of the case on appeal would be an academic exercise. The answer may also not be the ratio decidendi to the case and could be argued as not amounting to a stare decisis. At most, answering such questions could only be treated as an obiter or as a guide.

[26] In my opinion since this is our findings of the law it serves no purpose to remit the case back to the High Court.

[27] My brother judge, Mohd Ghazali FCJ, have read my judgment in draft and agreed with it. We therefore allow the appeal and order that the petition to wind up the appellant to be struck out. Cost is awarded to the appellant.

[28] Before judgment was delivered, parties were asked how much the cost should be and have agreed that is should be RM100,000 for the High Court, Court of Appeal and this court. Since that is the amount agreed, of course by the parties, we therefore award RM100,000 as cost for this court and the courts below.

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Zulkefli FCJ:

[29] I have had the privilege of studying the judgment in draft of the learned Chief Justice and I agree with the views expressed and the conclusion reached by His Lordship in allowing the appeal and the order made that the petition to wind up the appellant be struck out. I would like to add a few words in support of the judgment with particular reference to the issue of whether there was an inordinate delay in filing the application on the part of the appellant to strike out the winding-up petition filed by the respondents as follows:

[30] On the respondents' allegation of delay on the part of the appellant in filing an application under O 18 r 19 of the Rules of the High Court 1980 to strike out the petition, I am of the view there are clear evidence that parties were negotiating for settlement all the way. From the beginning, when the consent order dated 18 October 1996 was recorded parties knew that settlement process would take time. The consent order was in two parts. Each respondent was to receive a certain sum of money and a certain portion of land in return for the surrender of their shares. The respondents were to receive portions of their land upon subdivision of Lot No 19, CT No 1242, in the Mukim of Ulu Telom Cameron Highlands. This was clearly provided for by the consent order which stated, inter alia, that the appellant was to conduct a survey, allocate, subdivide and transfer the said land. The subdivision took time as the initial submission for subdivision was delayed by land acquisition process carried out by the government on certain portion of the appellant's land (*see the affidavit of Panirselvam affimed on 9 July 2008 at pp 224–230 and the affidavit of Summugam affirmed on 21 August 2008 at pp 1384–1398 of the appeal record*). The respondents were well aware of the delay caused by the subdivision. They were also aware from the beginning that other than the 60 acres of land due to them, the directors of the appellant could sell the other lands to settle the appellant's debts.

[31] It is also to be noted that the respondent filed the petition to wind up the appellant in November 2000, about four years after the consent order was recorded. This fact fortifies the appellant's contention that the parties were negotiating for a settlement despite the fact that under the consent order the obligations of the parties were to be performed within the period of twelve months of the service of the consent order.

[32] A question that can be posed in this case and which has remained unanswered especially by the respondents is in relation as to why the petition filed by the respondents in the year 2000 was not proceeded forthwith by the respondents to be heard and disposed of. It is to be noted that under the Companies Act 1965 and the Companies (Winding-Up) Rules 1972 ('the

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1972 Rules') the respondents as the petitioner in this case had to comply with the procedural requirements of the law such as service of the petition to the relevant parties, the advertisement and gazetting of the petition before the hearing date of the petition fixed by the court. A hearing date normally is given straight away when the petition is issued by the court. If the respondents as the petitioner has not complied with all the procedural requirements as spelt out under r 32 of the 1972 Rules, the registrar will not issue a registrar's certificate and no order save as to an order for the dismissal or adjournment of the petition shall be made on the petition of any petitioner at the hearing of the petition. In the present case we do not know the reasons why the petition of the respondents was not heard and disposed of at the first hearing date fixed by the court.

[33] I am of the view it would appear nothing objectionable if the appellant in the present case was to file the application to strike out the petition in November 2008 if the respondents as the petitioners themselves have not proceeded forthwith to deal with the petition filed in the year 2000 pending before the court. As for the appellant, it had a justifiable ground to file the application to strike out the petition when in good faith it had made payment into court to pay to the respondents the agreed sum under the consent order but was refused by the respondents who insisted on continuing with the petition. For this as rightly stated by the learned Chief Justice the respondents can be deemed to have acted in a vexatious manner and is a good ground for striking out the petition to wind up the appellant.

[34] Based on the facts and the circumstances of this case and for the reasons abovestated, I am of the considered view that the ground of inordinate delay cannot be attributed to the appellant to dismiss its application to strike out the petition under O 18 r 19 of the RHC 1980.

Appeal allowed with costs in the Federal Court and the courts below.

Reported by Ashok Kumar